BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

**ARGONAUT CONSTRUCTORS**
1236 Central Avenue
Santa Rosa, CA 95402

Employer

DOCKET 96-R1D5-1737

**DECISION**

## Background and Jurisdictional Information

Employer is a construction contractor. On May 31, 1996, the Division of Occupational Safety and Health (Division), through Stephan A. Williams, conducted a permit inspection at a place of employment maintained by Employer at 2510 Old Sonoma Road, Napa, California (the site). On May 31, 1996, the Division cited Employer for the following alleged violation of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[1]:

| Citation | Item | Section | Type | Penalty |
|---|---|---|---|---|
| 1 | 1 | 5158(d)(3) [Confined space: pre-entry testing] | General | $185 |

Employer has filed a timely appeal contesting the existence of the violation and the reasonableness of the proposed penalty.

This matter was presented for hearing before James Wolpman, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Santa Rosa, California, on February 21, 1997 at 1:00 p.m. Employer was represented by Frank J. Kielian, Safety Consultant. The Division was represented by Gerald Lombardo, District

[1] Unless otherwise specified, all references are to sections of Title 8, California Code of Regulations.

Manager. Oral and documentary evidence was introduced by the parties and the matter was submitted on February 21, 1997.

## Law and Motion

During the course of the hearing, the Division moved to reduce the proposed penalty from $185 to $150 because the previous citation which resulted in the denial of credit for its safety history was not yet final at the time the instant citation issued.

Good cause appearing therefor, the motion was granted.

## Docket 96-R1D5-1737

Citation 1, General, § 5158(d)(3)

## Summary of Evidence

Employer was engaged in joining a new drain pipe, 36" in diameter and 30' long, to an existing 72" storm drain in connection with work at a residential subdivision. At the time of the inspection, one of its employees had entered the existing storm drain by means of a ladder inserted through a hole, 2' in diameter, at the top of the drain and was in the process of constructing wooden formwork so that concrete could be poured to cover the 4' x 4' hole which had been cut into the storm drain where the new 36" pipe was to enter. (Exhibit 3.) He was working in an area 4 1/2' deep, immediately beneath the 2' entry hole.

The safety engineer testified that the ventilation in the drain was such that there was a realistic possibility that dangerous air contamination might develop in the area where the employee was working and that the 2' hole with a ladder inserted would make ready access or egress for the removal of a suddenly disabled employee difficult. His testimony was corroborated by the District Manager who testified to analogous situations where air inside storm drains had become seriously contaminated. On that basis, the Division contended that work area constituted a "confined space", as defined in 5158(b)(1), which necessitated pre-entry air testing. (§ 5158(d)(3).) The on-site foreman admitted to the inspector that no such testing had been done.

Employer acknowledged that no pre-entry testing had been performed but contended: (1) there would have been no difficulty in removing a disabled employee, and (2) there was sufficient ventilation to prevent any risk of dangerous air contamination or oxygen deficiency.

That being so, the work area was not a "confined space" and no pre-entry testing was required.

## Findings and Reasons for Decision

**BECAUSE THE DEFINITION OF A "CONFINED SPACE" INCORPORATES THE TERM AS IT WAS USED IN THE SAFETY ORDER IT REPLACED AND SINCE THAT EARLIER ORDER INDICATED THAT STORM DRAINS ARE CONFINED SPACES, PRE-ENTRY TESTING WAS REQUIRED. MOREOVER, THE DRAIN IN QUESTION MET THE CRITERIA IN THE CURRENT SAFETY ORDER FOR A "CONFINED SPACE" BECAUSE IT HAD A POTENTIAL FOR AIR CONTAMINATION AND IT LACKED READY ACCESS FOR THE REMOVAL OF A SUDDENLY DISABLED EMPLOYEE.**

**SINCE THERE WAS NO PRE-ENTRY TESTING, A VIOLATION IS FOUND. THE PROPOSED PENALTY, AS ADJUSTED, IS FAIR AND PROPER.**

Where construction operations are concerned, a "confined space" is defined by the concurrent existence of the following conditions:

> "(A) Existing ventilation is insufficient to remove dangerous air contamination and/or oxygen deficiency which may exist or develop.
>
> "(B) Ready access or egress for the removal of a suddenly disabled employee is difficult due to the location and/or size of the opening(s)." (§ 5158(b)(1).)

If those two conditions are met, § 5158(d)(3) requires pre-entry testing of the air to determine the existence of air contamination or oxygen deficiency.

The current definition of a confined space had its origin in an earlier safety order — § 1532 (a) — which provided:

> "Confined spaces for the purpose of this Article shall mean the interior of storm drains, sewers, vaults, utility pipe lines, manholes, and any other such structure which is similarly surrounded by confining surfaces so as to permit the accumulation of dangerous gases or vapors."

In ***Dorfman Construction Company, Inc.***, OSHAB 76-1100, Decision After Reconsideration (Feb. 2, 1981), the Board was called upon to determine whether pre-entry testing was required for a sewer line. The employer had been cited for violating § 1532(a). While its appeal was pending, that section was repealed and replaced by the current safety order. Citing ***Reese Construction Company, A Corp.***, OSHAB 78-1037, Decision After Reconsideration (Nov. 7, 1980), holding that a safety order which substantially re-enacts the substance of an older safety order keeps in existence the legal liabilities attached to violations of the older safety order, the Board found "that the definition of a confined space set forth in section 5156(b)(1)[2] indicates an intent to preserve the requirement of section 1532(a)." Since § 1532(a) specifically described a "sewer" as a "confined space," the Board determined that the same result should obtain under § 5156. Pre-entry testing was therefore necessary.

Since § 1532(a) also specifically described "storm drains" as confined spaces, the ***Dorfman*** decision dictates a similar outcome in the instant case: the storm drain was a confined space for which pre-entry testing was required.

Note that under the ***Dorfman*** analysis, it is unnecessary to go further and determine whether the particular storm drain at issue is one in which dangerous air contamination and/or oxygen deficiency might exist or develop, and whether ready access or egress to remove a disabled employee would be difficult. (***Id***. p. 3.) The fact that it is a storm drain is enough ***in and of itself*** to create a "confined space."

But even if one were to go beyond ***Dorfman*** and examine the potential for air contamination and the difficulty of access and egress inherent in the construction operations for which Employer was cited, the result would be the same.

Division Exhibit 1 is a photograph of the portion of 72" drain in which the employee was working. At the top is a 2' exit hole with a ladder inserted. It is obvious from the photograph that, even though the

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[2] At the time ***Dorfman*** was decided the present definition of a confined space was found in § 5156(b)(1). Subsequently, it was moved to its present loaction in § 5158(b)(1). The definition itself was not altered. (Compare Register 78, No. 37 (filed 9-14-78) with Registger 93, No. 48 (filed 11-14-93).)

employee was working immediately beneath the hole, it would have been difficult for others to get in and get him out if he were "suddenly disabled."

As for the second requirement — potential exposure to dangerous air contamination — Employer points to the 2' exit hole and to the 4' hole in the side of the pipe where the 36" pipe was to enter. The employee was working at that juncture, building wooden formwork, visible in the photograph, around the entry pipe. Although the formwork blocked off much of the opening, there was a slight gap between the wood and the concrete where air could enter. That plus the air from the exit above and the open end of the smaller pipe, 30' away, was, in Employer's opinion, enough to provide satisfactory ventilation.[3]

The Division's witnesses, Safety Engineer Stephan Williams and District Manager Gerald Lombardo, testified to 4 accidents which one or the other had personally investigated where fatal or serious injuries occurred in newly laid underground pipe because of leaking gas lines, the improper dumping of gasoline, or the generation of hydrogen sulfide due to unusual soil conditions. Three of those accidents involved storm drains. Both witnesses also pointed to the illegal, but recurring use of storm drains to dump gasoline or other flammable liquids, and Lombardo indicated that was particularly true in subdivisions under construction because the drains are easily accessible and frequently "no one is around" to prevent the practice. He also indicated that the buildup of air contaminants can occur rapidly and dangerously despite the existence of ventilation or nearby openings.

When that evidence is weighed against Employer's conclusionary testimony to the contrary and its concession that it would have been "a good idea to test, but personally I would not have issued a citation," the preponderance of the evidence favors the Division and establishes sufficient potential for air contamination to meet the definitional requirement of § 5158(b)(1)(A). The existence of nearby openings and gaps in the pipe were adequately taken into account by the Division when it charged the violation as general, rather than serious.

[3] Employer introduced a written statement from the on-site foreman which mentions an additional opening in the pipe. (Exhibit A, p. 3.) Because the statement is hearsay, inadmissible in a civil proceeding, it will not support a finding in the absence of corroborating non-hearsay evidence. (§ 376.2.) There is no such evidence; indeed, Safety Engineer Williams had no recollection of any additional opening.

The proposed penalty, as adjusted above (***infra***, p. 2), was computed in accordance with the Director's Regulations and is reasonable and proper.[4]

A general violation of § 5158(d)(3) has been established. A civil penalty in the amount of $150 is assessed.

DATED: March 24, 1997

JAMES WOLPMAN
Administrative Law Judge

[4] In its original appeal, Employer indicated that abatement was an issue. However, since the citation states that the hazard was immediately abated, that issue was withdrawn from consideration.